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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA,

PETITIONER

V.

JOHN RONALD DANIELS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

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QUESTION PRESENTED

Does Beck v. Alabama, 447 U.S. 625 (1980), require the reversal of all Alabama pre-Beck capital convictions including those in which there was absolutely no evidentiary basis for a lesser included offense instruction?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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V.

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RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR PETITIONERS

OPINIONS BELOW

1. The opinion of the Court of Criminal Appeals of Alabama, not as yet reported, appears in Appendix A.

2. The opinion of the Supreme Court of Alabama, not as yet reported, appears in Appendix B.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. § 1257. The order of the Supreme Court of Alabama denying certiorari was issued December 11, 1981, and this petition is filed within sixty (60) days of said date.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, which provides:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

STATUTORY PROVISIONS INVOLVED

1975 Alabama Acts, No. 213, codified as Code of Alabama 1975, Title 13, §§ 13-11-1 through 13-11-9, the same being voluminous is reproduced in Appendix C.

STATEMENT OF THE CASE

THE FACTS CONCERNING THE CRIME

Between 5:00 and 6:30 p.m. on January 2, 1977, near the Theodore-Dawes Exit on Interstate 10 in Mobile County, nineteen-year-old Ricky Brune and fifteen-year-old Cheryl Moore were found dead. (R. pp. 286-287) Their deaths resulted from multiple gunshot wounds in the back from a .38 caliber pistol and a sixteen-gauge shotgun. (R. pp. 382-389) The time of death was fixed at between 4:15 and 6:15. (R. p. 380) The fatal shots were fired from inside the car from the rear seat. (R. p. 398) At around 5:00 p.m., an unoccupied Ford had been spotted parked at the exit with the motor running. (R. pp. 289-291)

Daniels and his partner, Philip Wayne Tomlin, had arrived in Mobile from Houston, Texas, at Randy and Danny Shanks' trailer the night before be-

tween 11:30 and 12:00 p.m. The Shanks were Tomlin's brothers-in-law. Tomlin introduced Daniels and told the Shanks "they had to come to Mobile to kill the guy that killed his brother." (R. pp. 418-422, 504) Tomlin's brother had been killed on November 25, 1975, as a result of an accidental shotgun discharge which involved Ricky Brune. (R. pp. 294-296)

Randy Shanks rented a room at the Eight Days Inn for Daniels and Tomlin. (R. p. 422) Daniels and Tomlin showed the Shanks a .38 caliber pistol and .44 caliber pistol and a disassembled gun. (R. p. 423) Tomlin asked Danny Shanks if he would take them to New Orleans the next day in his car. (R. pp. 442, 504) Shanks told him no. (R. pp. 443, 504) Tomlin was driving his sister's 1968 Ford. (R. pp. 440, 513) Daniels and Tomlin had flown from Houston to

New Orleans and Tomlin's father picked them up there and brought them to Mobile.

Tomlin's sister's 1968 Ford was found abandoned at the New Orleans International Airport on January 30, 1977. (R. p. 601) Inside the automobile was found a parking lot ticket from an automatic dispenser at the airport parking lot. According to the ticket the automobile had entered the parking lot on January 2, 1977 at 8:08 p.m. The driving time from Mobile to the New Orleans International Airport is two and a half hours. (R. p. 600)

Eastern Airlines flight 569 from New Orleans to Houston departed at 9:40 p.m. on January 2, 1977. (R. p. 343) At the time of his arrest in Houston, Texas, Daniels had a suitcase attached to which was a baggage check which indicated that the suitcase had been

checked on Eastern Airlines' Flight 569, New Orleans to Houston. Inside the suitcase were three 16 gauge shotgun shells. (R. pp. 574-575)

Melvin Tuberville knew Daniels from cell 308 in the county jail. He testified about a conversation with Daniels about his case, wherein Daniels said that "him and Tomlin had killed this boy and girl out on the interstate...at Theodore Dawes Road." (R. p. 305)

The defense was alibi. Daniels denied that he was in Mobile, Alabama, on January 1-2, 1977. (R. pp. 685-687)

THE STATE TRIAL AND APPELLATE COURT PROCEEDINGS

The Respondent, John Ronald Daniels, was indicted by the Grand Jury of Mobile County, Alabama, for capital murder in April of 1978. His

plea was one of not guilty. (R. pp. 1-3) The Respondent was convicted and sentenced to death. (R. p. 39 and pp. 70-73)

Appeal was taken to the Alabama Court of Criminal Appeals wherein the Respondent raised the issue of the preclusion clause. The issue of the preclusion of consideration of lesser included offenses had also been raised in the trial court by way of a Motion to Quash Due To Unconstitutionality of Act Number 213. (R. pp. 4-8) On August 4, 1981, the Alabama Court of Criminal Appeals issued the following order:

> "The judgment of the conviction is reversed and the cause remanded for a new trial on authority of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), on remand, Ala., 396 So. 2d 645 (1981), and Ritter v. State, Ala.S.C. No. 77-798 (Ms. May 8, 1981), Ala.Cr. App., 1 Div. 837 (Ms. June

> 23, 1981), July 7, 1981, Motion for State of Mandate Denied by Ala.S.C.
>
> REVERSED AND REMANDED."

(Daniels v. State, Ala. Cr. App., ___ So. 2d ___ (1981) [Appendix A])

The State of Alabama presented the question raised herein to the Supreme Court of Alabama by a petition for writ of certiorari which on December 11, 1981, issued the following order:

> "Petition for Writ of Certiorari denied. No opinion." (Daniels v. State, Ala., ___ So. 2d ___ (1981) [Appendix B])

SUMMARY OF ARGUMENT

Beck v. Alabama, 447 U.S. 625 (1980), held that it was unconstitutional to prevent a capital jury from considering a lesser included offense verdict which is supported by the evidence at trial. In Beck there was evi-

dence to support lesser offense instructions which would have been given had it not been for the preclusion clause. In the instant case, however, there was no evidentiary basis for lesser offense instructions. The jury would not have received any lesser offense instruction even if the preclusion clause had not existed.

The Court of Criminal Appeals and the Supreme Court of Alabama have held in this case and others that all pre-Beck cases must be retried regardless of the impact of the preclusion clause struck down in Beck. See Ritter v. State, Ala., 403 So. 2d 154 (1981) and (Ala., ___ So. 2d ___ (Dec. 11, 1981) and Bracewell v. State, Ala., ___ So. 2d ___ (June 19, 1981) (unreported) and Ala., 401 So. 2d 130 (1981). The interpretation of the Beck decision by the Alabama appellate courts is incorrect in that this Honorable Court's de-

cision in Beck does not mandate retrial in every case without regard to the evidence. On June 22, 1981, this Honorable Court granted certiorari in Hooper v. Evans, 80-1714, to decide whether the Beck decision requires reversals of all pre-Beck capital convictions including those for which there was no evidentiary basis for lesser offense instructions. Britton v. Evans, 49 LW 3954.

Remanding this case for a new trial creates the risk of an arbitrary and capricious verdict such as was condemned in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 [1972] and Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d 974, 96 S.Ct. 3001 (1976). This risk is unnecessary because there is a procedure, remandment, by which Respondent's rights can be fully protected without unconstitutional risk. Pate v. State, Ala., ____ So. 2d ___ May 8, 1981).

ARGUMENT

I.

THE DECISION IN BECK V. ALABAMA 447 U.S. 625 (1980), DOES NOT MANDATE THE AUTOMATIC REVERSAL OF ALL PRE-BECK CAPITAL CONVICTIONS. (REASON FOR GRANTING THE WRIT - CONFLICT WITH BECK V. ALABAMA, 447 U.S. 625 [1980])

In Beck v. Alabama, 447 U.S. 625, (1980), this Court held that it was unconstitutional to impose a sentence of death on a defendant when the evidence at his trial would have supported a lesser included non-capital offense verdict which the jury was not permitted to consider. In the Beck case, there was evidence to support a lesser offense instruction and the jury which convicted Beck would have received such an instruction if the statutory preclusion clause had not operated to prevent it. This Court carefully limited its grant of certiorari as is clear from the language in the first paragraph of

the opinion wherein this Honorable Court expressed the limitation as follows:

> "We granted certiorari to decide the following question:
>
> "'May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?' 444 U.S. 897
>
> "We now hold that the death penalty may not be imposed under these circumstances."
>
> 447 U.S. at 627

The Beck rule has been applied in Ritter v. State, Ala., 403 So. 2d 154 (1981), a case in which there is no evidence of lesser included offenses. In Ritter the Alabama Supreme Court reversed, on authority of Beck, the conviction of a defendant who had pleaded guilty to the capital offense, who had in fact admitted his guilt and demanded

the death penalty. The Court wrote, in denying rehearing in Ritter:

> "We believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, 639 F. 2d 221 (March 19, 1981) (Pending on certiorari in this Honorable Court), which involved Ritter's partner in this crime."

A pattern was established for all pre-Beck cases by the decision in Ritter. This Honorable Court's decision in Beck was interpreted as requiring automatic retrials.

On December 11, 1981, the Alabama Supreme Court wrote:

> "The United States Supreme Court has remanded this case to this Court for further consideration in light of Reed v. State, Ala., [MS. June 12, 1981] ___ So. 2d ___ (1981), extended on rehearing (August 28, 1981), motion for clarification denied (October 7, 1981).

> "On June 12, 1981, this Court extended its initial opinion in the present case to explain that our reversal and remand was compelled by the decision of the United States Supreme Court in Beck v. Alabama, [447] U.S. [625], 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State, Ala., 396 So. 2d 645 (1980), and was "consistent with the interpretation of that decision" reached by the Fifth Circuit in Evans v. Britton, [639] F. 2d [221] [March 19, 1981] (1981). We adopt our previous opinion and now unequivocally hold that our previous opinion in this case was based upon federal constitutional grounds, not state law grounds. Moreover, our opinion in Reed v. State, supra, rather than altering our previous decision in this case explained further why we felt compelled by federal constitutional considerations to reverse the conviction in this case." (Ritter v. State [S. Ct. Ala., Dec. 11, 1981] ___ So. 2d ___).

The issue, therefore, is whether this Honorable Court's decision in Beck mandates retrial in every case without regard to the evidence. The Petitioner

respectfully submits that automatic retrial is not so mandated.

There was no evidence at Respondent's trial to support any lesser included offense instruction. The evidence presented two choices for the jury. Either the Respondent participated in the killing of the two victims in Mobile, Alabama, or the Respondent was in Texas. Consequently, the preclusion clause had no impact on this case.

The Alabama statute, before the severance of the preclusion clause, required that juries choose between guilt of the capital offense or acquittal, even if the evidence suggested a middle verdict. Had the preclusion clause never existed, however, this case would still have presented the Respondent's jury with the same two choices. The possibility of a verdict of guilty of a

lesser included offense was precluded by the evidence. The Alabama Court of Criminal Appeals and the Supreme Court of Alabama have decided this issue in a manner in conflict with this Honorable Court's opinion in Beck. Petitioner submits that this Honorable Court did not mandate automatic reversal for cases which could not have been affected in any way by the preclusion clause. Certiorari was granted by this Honorable Court on June 22, 1981, to decide among other issues, whether the Beck decision mandates the reversal of all pre-Beck capital convictions including those for which there was no lesser included offense predicate. Hopper v. Evans, 80-1714, sub. nom. Britton v. Evans, 49 LW 3954.

II.

REVERSING THIS CASE FOR A NEW TRIAL CREATES THE UNCONSTITUTIONAL RISK OF AN ARBITRARY AND CAPRICIOUS VERDICT. (REASON FOR GRANTING THE WRIT - CONFLICT WITH FURMAN V. GEORGIA, 408 U.S. 238 (1972) AND ROBERTS V. LOUISIANA, 428 U.S. 325 [1976])

Reversing cases like the instant case on authority of Beck creates the possibility that on retrial the jury will be permitted to consider lesser included offenses even if the evidence is a carbon copy of that presented at the first trial. This creates the possibility of arbitrary and capricious verdicts contrary to the evidence. Procedures which needlessly create such possibilities were condemned in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) and again in Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d 974, 96 S. Ct. 3001 (1976).

In the instant case the conclusive and uncontradicted evidence was that

the crime was capital murder. The jury may well have believed Respondent's alibi and acquitted him, but they could not have convicted him under the evidence of anything other than that of a capital crime. Furthermore, Daniels has never proven, or even alleged, that his failure to present lesser offense evidence was caused by the existence of the preclusion clause. He was not prevented from presenting lesser offense evidence and putting forth the defense that he was due to be acquitted of the capital charge because he was guilty of only a lesser offense. Daniels was not, therefore, harmed or prejudiced in any way by the existence of the preclusion clause; his due process rights were not violated. Consequently, his conviction should not be set aside.

No defendant has the right to jury instructions on lesser included

offenses where there is no evidence which supports such lesser included offenses. What is given to a defendant in a capital case by the Constitution is the right to jury instructions on those lesser included offenses for which the evidence would support a verdict. Beck v. Alabama, supra; Gregg v. Georgia, 428 U.S. 153,160-163, 215-216 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976).

The language of the Court itself in Beck shows that the holding in that case was limited to those cases where there was a basis in the evidence for instructions on lesser included offenses. In addition, the precedents relied on for so limiting the Court's ruling also require that some evidentiary predicate exist before a lesser included offense jury instruction must be given. E.g., Keeble v. United States, 412 U.S. 205, 208 (1973); Berra

v. United States, 351 U.S. 131, 134 (1956).

The test used in Alabama for determining if a defendant is due jury instructions on lesser included offenses is whether "there is any reasonable theory from the evidence which would support the position." Fulghum v. State, 291 Ala. 71, 277 So. 2d 776, 890 (1973), Accord, Chavers v. State, Ala., 361 So. 2d 1106 (1978). It follows that a defendant is not entitled to jury instructions on lesser included offenses where there is no evidence to support a conviction for such an offense. E.g., Fulghum, supra, Harvest v. State, Ala. Cr. App., 342 So. 2d 1369, (1977); Golston v. State, 57 Ala. App. 623, 330 So. 2d 446 (1975)

It is this test, whether there is any reasonable theory from the evidence to support a lesser included offense

instruction, which must first be applied to the facts in the instant case before a remand for retrial is ordered. The fact that the instant case is a capital case does not make this test inapplicable as the Alabama Supreme Court in Beck v. State, Ala. 396 So. 2d 645, 657 (1981) (on remand), held that:

> "Absent the 14 words which constitute the preclusion clause, the long established Alabama statutory and common law rule will apply so that juries in capital cases will be instructed on any lesser included offenses supported by the evidence...."

Nothing in the Constitution requires that a court in a capital case charge the jury on lesser included offenses when there is no evidence to support a conviction for such an offense.

There is available an alternative procedure which avoids the risk of arbitrary and capricious verdicts while

guaranteeing the accused full protection from even any theoretical adverse effects of the preclusion clause.

The alternative to an automatic new trial is a hearing in the trial court on the issue of the effect of the preclusion clause on the original trial. There is recent precedent for such a hearing in the alternative to a new trial. In Pate v. State, Ala., ___ So. 2d ___ (May 8, 1981), the Alabama Supreme Court found that the trial court erred in not reviewing pre-trial witness statements but did not order a new trial unless it appeared that the error had affected the original trial. In Pate the cause was remanded to the trial court for such determination. Since this remandment procedure is available, it should, under the decisions of this Honorable Court, be pursued rather than the automatic granting of a new trial.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama in this case present conflicts with the prior decisions and opinions of this Honorable Court. For this reason, the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions and opinions of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama and upon such review will reverse the decisions of said Courts granting a new trial to the Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Helen P. Nelson, an Assistant Attorney General and a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this 21st day of January, 1982, I did serve the requisite number of copies of the foregoing on the Attorneys for John Ronald Daniels, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

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